No. 92-1244

Supreme Court, U.S.
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1992

MARTIN ALLEN FINE,

Petitioner,

vs.

TOM PETTY, JEFF LYNNE, MIKE CAMPBELL, MCA RECORDS, INC., SBK APRIL MUSIC INC., WARNER BROTHERS MUSIC CORPORATION AND GONE GATOR MUSIC,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

# PETITION FOR WRIT OF CERTIORARI

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## QUESTIONS PRESENTED FOR REVIEW

1. Whether a musical composition embodied soley in a phonorecord sold prior to 1978 is considered an unpublished work and protected by common law copyright prior to 1978 under the Copyright Act of 1909.

2. Whether a musical composition embodied soley in a phonorecord sold prior to 1978 and still available to the public on January 1, 1978 is deemed first published on that date and automatically vested with statutory copyright protection on January 1, 1978, the date the Copyright Act of 1976 became effective.

3. Whether a musical composition embodied soley in a phonorecord passed into the public domain without copyright protection before January 1, 1978 under the Copyright Act of 1976 by virtue of being published by sales of the phonorecord prior to 1978.

4. Whether the Copyright Office properly issued petitioner Fine a certificate of copyright registration in 1990 for the musical compositions embodied in his 1976 phonorecord.

5. Whether pursuant to 17 U.S.C. §408(a) the registration of a musical composition with the Copyright Office is necessary for copyright protection.

6. Whether pursuant to 17 U.S.C. §401(a) notice of copyright is required for a musical composition which is not visually perceptible.

7. Whether the directives in the Compendium of Copyright Office Practices with respect to what constitutes publication of music recorded prior to 1978 are correct under the federal copyright laws.

8. Whether a federal court of appeals should reach an issue raised for the first time on appeal when the issue presented is purely one of law or when review is necessary to prevent a miscarriage of justice and the erroneous application of the federal copyright laws to the undisputed record facts.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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Petitioner, Martin Allen Fine, respectfully prays that a writ of certiorari issue to review the judgment, memorandum and order of the United States Court of Appeals for the Ninth Circuit refusing to reach an issue of pure law raised for the first time on appeal

and affirming the judgment and erroneous conclusion of law by the District Court for the Central District of California that under the Copyright Act of 1976, the allegedly infringed music passed into the public domain without copyright protection before January 1, 1978.

## OPINIONS BELOW

The judgment of the United States Court of Appeals for the Ninth Circuit, set forth in an unpublished memorandum, was entered on September 1, 1992 and appears in Appendix A to this Petition.

The order of the United States Court of Appeals for the Ninth Circuit denying Petitioner's petition for rehearing and suggestion for rehearing en banc was filed on November 23, 1992 and the unpublished order appears in Appendix B to this Petition.

The unpublished judgment of the District Court for the Central District of California was entered on April 30, 1991 and appears in Appendix C to this Petition.

The unpublished Findings of Fact and Conclusions of Law of the District Court for

the Central District of California was entered on April 30, 1991 and appear in Appendix D to this Petition.

## JURISDICTION

The Court of Appeals' judgment in this matter was filed on September 1, 1992. A timely Petition for Rehearing was filed on September 11, 1992. The Court of Appeals' denial of the Petition for Rehearing was issued on November 23, 1992. This Court's jurisdiction is invoked under Title 28, United States Code, section 1254(1).

## STATUTORY PROVISIONS INVOLVED

Since the Copyright Acts of 1909 and 1976 and the Code of Federal Regulations are lengthy, the following sections are set forth in Appendix E: 37 C.F.R. §202.8(b)(1971); 17 U.S.C. §2(1909); 17 U.S.C. §101 (1976); 17 U.S.C. §401(a)(1976); 17 U.S.C. §408(a)(1976).

## STATEMENT OF THE CASE

In 1976, petitioner Fine recorded and released for sale a solo record album entitled "For God's Sake," which contains the subject song "Ascending." Fine wrote, sang and produced

all the songs on the record album. It is undisputed that Fine's record album was sold in 1976 and 1977 and that the record album was still available in at least four stores well beyond January 1, 1978.

Also in 1976, Fine registered with the Copyright Office some handwritten chords to the song "Ascending," however, it is undisputed that the handwritten chords published and registered in 1976 do not represent the musical composition of "Ascending" as it is embodied in the phonorecord. This is corroborated by the District Court's Finding of Fact No. 3 which states that: "Plaintiff Fine's deposit with the Copyright Office of "Ascending" does not indicate a concluding instrumental section nor the chord progression therein nor the guitar solo therein." Therefore, the approximately two minute concluding instrumental portion of the music which Fine contends was infringed upon was never published by the handwritten chords deposited with the Copyright Office in 1976.

This fact is central to petitioner's argument that, contrary to the District Court's

conclusions of law, the musical composition of "Ascending" was not published prior to 1978 by sales of the phonorecord in 1976 and 1977 and did not pass into the public domain without copyright protection, for under the 1909 Copyright Act, the musical composition was protected by common law copyright as an unpublished work until January 1, 1978 and then on that date when the Copyright Act of 1976 became effective, it was deemed first published and automatically vested with statutory copyright protection.

On February 28, 1990, Fine filed his lawsuit, alleging that the music in respondents' song "Runnin' Down A Dream" infringed upon the music in his copyrighted song "Ascending." The United States District Court, Central District of California, had jurisdiction pursuant to 28 U.S.C. §1338.

It is undisputed that in December, 1987, some three months prior to the recording of respondents' song "Runnin' Down A Dream," Fine personally gave a copy of his record album to George Harrison and Jeff Lynne, one of the respondent co-writers of their song. It is

undisputed that in April, 1990, musicologists from the University of Southern California and California Polytechnic State University, San Luis Obispo stated in their independent reports that the music in the two songs was "identical" and "versions of the same music."

It is also undisputed that the Copyright Office issued Fine a certificate of copyright registration for all the musical compositions on his record album "For God's Sake" based on the deposit of two copies of the record album in July, 1990. In the Certificate of Copyright Registration, No. PA 473-592, the date of first publication of the musical work is properly documented as being January 1, 1978. Contrary to the holding of the District Court, the issuance of this certificate of copyright registration verifies Fine's valid copyright ownership in the applicable musical composition and demonstrates that the applicable music did not pass into the public domain without copyright protection. Furthermore, Fine's certificate of copyright registration and his valid copyright ownership in the allegedly infringed

music is supported by the relevant portions of the Compendium of Copyright Office Practices which are directly on point with respect to the facts of the instant case.

In November, 1990, Fine moved for leave to supplement his complaint for copyright infringement and on April 25, 1991, the District Court granted leave to amend and deemed the supplement to complaint filed and served on that date. The aforesaid certificate of copyright registration issued in 1990 was attached to the supplement to complaint which also expressly referred to the certificate and indicated that January 1, 1978 was deemed to be the date of first publication.

On April 30, 1991, the District Court granted the respondents' summary judgment motion and held that the allegedly infringed music passed into the public domain prior to January 1, 1978 without copyright protection because it had been published by sales of the phonorecords in 1976 and 1977.

Petitioner Fine had argued in the District Court that his allegedly infringed music was

protected by statutory copyright since 1976. On appeal to the United States Court of Appeals for the Ninth Circuit, Fine admitedly changed his legal theory without raising any new facts and argued for the first time that his musical composition, which was undisputedly embodied soley on his phonorecord sold prior to 1978, was protected by common law copyright as an unpublished work until January 1, 1978 under the Copyright Act of 1909 and then on that date was deemed published and automatically vested with statutory copyright protection under the Copyright Act of 1976.

The Ninth Circuit declined to review the merits of the appeal and held that it would not reach an issue raised for the first time on appeal. Petitioner Fine filed a timely petition for rehearing and argued that the Court had overlooked a long list of recent Ninth Circuit cases which set forth two exceptions to the general rule, specifically that the Ninth Circuit Court of Appeals will consider an issue raised for the first time on appeal when the issue presented is purely one of law or when review is necessary

to prevent a miscarriage of justice.

The exceptions were both applicable to the instant case since Fine's appeal was based on a purely legal issue and raised no new facts and in that the appeal sought to prevent the erroneous application of the federal copyright laws to the undisputed factual record. However, the Ninth Circuit denied the petition for rehearing and was split 2-1 in denying the suggestion for rehearing en banc.

Certiorari should be granted for two reasons: (1) this petition presents issues not specifically and unequivocally decided by this Court and (2) the decisions below conflict with the Copyright Acts of 1909 and 1976, the Code of Federal Regulations, the Compendium of Copyright Office Practices, and relevant federal case law.

This petition presents the first opportunity for this Court to consider the interplay between the 1909 and 1976 Copyright Acts and to eliminate the confusion with respect to the issue of publication and copyright protection for music embodied in phonorecords sold prior to 1978 and still available to the public thereafter.

## ARGUMENT

It would be easy for this Court to deny Fine's petition for writ of certiorari and sweep this case under the rug of appellate procedure. Few would take notice as this case does not have the far reaching social ramifications of a case involving civil rights or abortion. However, it is hoped that the day has not yet arrived when judicial economy takes precedence over manifest justice, for if the erroneous decisions of the lower courts are allowed to stand, the integrity of the federal copyright laws as well as the appellate process will be called into question. Furthermore, should petitioner Fine's writ not be allowed, he will be liable for over $220,000 in attorneys' fees and expenses which is being pursued by the respondents herein in separate actions still pending in the courts below under 17 U.S.C. §505.

This case does present this Court with the first opportunity for a federal appellate court to review the interplay between the 1909 and 1976 Copyright Acts with respect to the issue of what constitutes the publication of music embodied in

a phonorecord. The lower courts in the instant case have adjudicated this important issue of federal copyright law in conflict with prior case law and in conflict with the 1909 and 1976 Copyright Acts, the Code of Federal Regulations, and the Compendium of Copyright Office Practices. Furthermore, no federal appellate court has reviewed the directives in the Compendium of Copyright Office Practices which articulate the changes in the 1976 Copyright Act from the 1909 Copyright Act with respect to the definition of what constitutes publication of music embodied in a phonorecord. This Court must consider the merits of this petition in order to protect all music recorded prior to 1978 and embodied soley in a phonorecord as is the situation in the instant case.

Petitioner Fine has never disputed the Findings of Fact by the District Court in the instant case and furthermore has never raised any new facts on appeal. Fine's appeal to the Ninth Circuit was based on an issue of pure law and was simply based on the contention that the District Court's Conclusions of Law were clearly

erroneous in that they misapplied the Findings of Fact with respect to the interplay between the 1909 and 1976 Copyright Acts on the issue of publication of music embodied soley in a phonorecord.

The District Court's Findings of Fact in the instant case are correct that Fine's allegedly infringed music in the song "Ascending" was embodied only on his phonorecord and distributed since 1976. However, the District Court's Conclusion of Law No. 6 that "Plaintiff Fine's sale and distribution and attempts to sell and distribute copies of the phonorecord album 'For God's Sake' in 1976 and 1977 amounted to general publication of the instrumental segment concluding the recorded version of 'Ascending'" is clearly erroneous and stems from the District Court's misplaced concern with the sound recording of the allegedly infringed music rather than with the underlying musical composition embodied in the recorded version of "Ascending."

The District Court failed to comprehend that Fine was not making a claim of copyright with respect to the sound recording of "Ascending"

but was instead making a claim of copyright only with respect to the underlying music embodied in the recorded version of "Ascending." In his opposition to defendants' summary judgment motion below, Fine argued the distinction between an SR certificate of copyright for a sound recording and the applicable PA certificate of copyright registration for a musical composition which Fine had been issued, but the District Court's misplaced Conclusion of Law No. 7 stated that "Plaintiff Fine has not obtained a sound recording copyright for the album 'For God's Sake' or the recorded version of 'Ascending.'"

Not only is registration not necessary for copyright protection, but Fine never claimed to have an SR certificate to register the sounds on his album nor did Fine ever allege infringement of the sounds on his album, and his supplement to complaint referred to and attached only the PA certificate of copyright registration which validly registered his copyright for the allegedly infringed music of "Ascending" which was embodied only in the phonorecord "For God's Sake" and which was expressly deemed to have been published on

January 1, 1978 pursuant to a directive from the Copyright Office.

Based on this misplaced concern with the sound recording copyright, the District Court misapplied the interplay between the 1909 and 1976 Copyright Acts with respect to what constituted publication of underlying music embodied only in a phonorecord and consequently, the District Court erroneously held in Conclusion of Law No. 8 that Fine's allegedly infringed music in the recorded version of 'Ascending' passed into the public domain without copyright protection before January 1, 1978 simply because there were sales and distribution of the phonorecord embodying the music in 1976 and 1977. This conclusion that sales and distribution of phonorecords in 1976 and 1977 published the underlying music soley embodied in the phonorecord is in direct conflict with the Copyright Acts of 1909 and 1976 as well as in conflict with prior federal case law.

Petitioner Fine's argument which illustrates the lower court's misapplication of the federal copyright laws can be briefly summarized as

follows:

It is undisputed that Fine's allegedly infringed music was embodied only in a phonorecord that was released in 1976 and still available to the public in "at least four stores well beyond January 1, 1978." Under the 1909 Copyright Act, a phonorecord was not considered a "copy" of the musical composition embodied in it, so prior to 1978 (the date the Copyright Act of 1976 became effective), sales of the record did not publish the underlying music and the music was vested with common law copyright protection as an unpublished work. Though this may have been somewhat illogical, it was the law prior to 1978. The Copyright Act of 1976 changed this precept and expressly stated that a phonorecord was a copy of the underlying musical composition and that on January 1, 1978, the date the 1976 Act became effective, the musical composition previously released was deemed to be first published and automatically vested with statutory copyright protection by virtue of being "fixed" on the phonorecord and still available to the public.

Thus, the correct conclusion of law is that Fine's allegedly infringed music was protected by common law copyright prior to 1978 and automatically vested with statutory copyright protection since January 1, 1978 and therefore, contrary to the District Court's Conclusion of Law No. 8, the music never passed into the public domain without copyright protection. This analysis is supported by the Code of Federal Regulations, the Compendium of Copyright Office Practices and several precedent setting cases which will be discussed hereinbelow.

In White-Smith Music Co. v. Apollo Co., 209 U.S. 1 (1908), this Court held that a music roll for mechanical pianos (and by extension, all phonorecords per Corcoran v. Montgomery Ward and Co., 121 F.2d 572 (9thCir.1941)) did not constitute a "copy" of the music thereby recorded within the meaning of the 1909 Copyright Act since a copy must be intelligible and in a form which can be seen or read.

In Rosette v. Rainbo Record Mfg. Corp., 354 F.Supp 1183 (S.D.N.Y.1973) aff'd 546 F.2d 461 (2dCir.1976), it was held that a phonograph

record is not a copy of the musical composition... nor is the sale of a record a "publication" of the underlying composition under the 1909 Copyright Act. Therefore, in the instant case, under the 1909 Copyright Act which was in effect until 1978, Fine's phonorecord "For God's Sake" was not a copy of the underlying music in the song "Ascending" which was embodied only in that phonorecord and thus the sales and distribution of Fine's phonorecord in 1976 and 1977 (before the Copyright Act of 1976 became effective on January 1, 1978) did not constitute "publication" of the previously unpublished musical work contained therein, and consequently, the common law copyright in the unpublished music of "Ascending" was not divested by the sales of the phonorecord.

Though this rationale may have been somewhat illogical, it was the law until the Copyright Act of 1976 became effective on January 1, 1978 and was corroborated by the Code of Federal Regulations and the Compendium of Copyright Office Practices in effect at the time.

37 Code of Federal Regulations, §202.8(b) (1971) states:

A phonograph record or other sound recording is not considered a "copy" of the compositions recorded on it, and is not acceptable for copyright registration.

at 137.

Furthermore, Compendium of Copyright Office Practices (I), §3.1.3 (Copyright Office;1973) states:

IV. Distribution of Phonorecords

a. A phonorecord, such as a disc, tape, or other similar reproduction of a sound recording, is not regarded as a "copy" of the musical composition, dramatic composition, or literary work recorded on it, and is not acceptible as a deposit copy for copyright registration of the musical composition or the literary or dramatic work. Therefore, the act of distributing phonorecords does not constitute such publication as will invest a statutory copyright, except for registration as a sound recording in Class N.

at 3-10.

These guidelines were followed in Jones v. Virgin Records, LTD, 643 F. Supp 1153 (S.D.N.Y. 1986) which has been the only case to consider

the interplay between the 1909 and 1976 Copyright Acts with respect to the issue of what constitutes publication of music embodied in a phonorecord.

In Jones, the song at issue was recorded in 1960 and contained music not found in the 1959 version filed with the Copyright Office. The 1960 version was not registered with the Copyright Office until 1984. In the instant case, the song at issue was recorded in 1976 and contained music not found in the handwritten version filed in 1976 with the Copyright Office. Similarly, the recorded version was not registered with the Copyright Office until 1990.

In Jones, the Court held that the song composers' failure to affix proper copyright notice to the 1960 phonorecord did not affect any statutory or common law copyright protection otherwise applicable to the underlying work, and that the contention that the work was therefore ceded to the public domain was meritless. 17 U.S.C. (1976Ed) §9; 17 U.S.C.A. §§101,402.

The Jones court further held that a version of a song which was placed before the public only in

the form of phonorecords was not "published" and did not lose its common law copyright protection under the 1909 Copyright Act as an unpublished work. U.S.C.A. §101 et seq.

The Jones court confirmed that the 1909 Copyright Act adopted the White-Smith definition of "copy" and did not require that a phonorecord have proper notice of copyright affixed to it in order to protect the underlying musical work recorded therein. The Jones court added that the 1976 Copyright Act similarly does not require that notice of copyright in a musical work be affixed to a phonorecord in order to protect the underlying musical work and therefore, any argument respondents herein may present with respect to notice of copyright is inapplicable.

The Jones court noted that the 1909 Copyright Act pre-empted most then existing common law and statutory copyright protection but that Congress explicitly exempted from such preemption common law copyright in unpublished works. 17 U.S.C. §2 (1909). This is relevant to the instant case where the applicable musical work was considered unpublished prior to 1978.

In Jones, as in the instant case, the musical composition contained in the phonorecord was placed before the public only in the form of phonorecords and accordingly, the Jones court held that the musical composition was not published and did not lose its common law copyright protection under the 1909 Act as an unpublished work.

In the instant case, Fine registered his 1976 musical composition with the Copyright Office in 1990 and similarly in Jones, the plaintiffs registered their 1960 musical composition with the Copyright Office in 1984. The Jones court rejected the defendants' assertion that since plaintiffs did not register the work until 1984, they lost whatever opportunity they had to obtain statutory copyright protection because they failed to comply with the filing requirements of section 405 of the 1976 Copyright Act. The Jones court simply found this contention by defendants to be without merit and cited section 408 of the 1976 Copyright Act which states in pertinent part that "at any time during the subsistence of copyright

in any published or unpublished work, the owner of copyright or of any exclusive right in the work may obtain registration of the copyright claim...such registration is not a condition of copyright protection." 17 U.S.C. §408(a) (1976).

Thus, the holding of the Jones court is directly on point with respect to the issues presented in the instant case and clearly contradicts the holding of the District Court in the instant case. Since it is an undisputed fact that the handwritten chords for "Ascending" which were published back in 1976 are totally different from the recorded music in "Ascending," the musical composition was never reduced to a "copy" and remained unpublished prior to 1978 even though the phonorecord which embodied the work was sold in 1976 and 1977, and thus the unpublished musical composition retained common law copyright protection and did not pass into the public domain.

Under the 1976 Copyright Act which became effective on January 1, 1978, the underlying musical composition was deemed published by virtue of the sale or distribution of the

phonorecord into which it was "fixed." 17 U.S.C. §101. Since it is undisputed that copies of Fine's phonorecords were still available to the public "well beyond January 1, 1978," the underlying musical composition was deemed published on January 1, 1978 as indicated in Fine's supplement to complaint and in his certificate of copyright registration attached to the supplement to the complaint. Therefore, by virtue of the Copyright Act of 1976, the musical composition of "Ascending" was automatically vested with statutory copyright protection without the requirement of copyright notice since the underlying musical composition embodied in the phonorecord was not "visually perceptible." 17 U.S.C. §401(a).

The foregoing analysis is corroborated and articulated by the following sections in the Compendium of Copyright Office Practices (II), (Copyright Office;1984) which are also directly on point with respect to the issue of publication resented in the instant case.

Section 909 of the Compendium of Copyright Office Practices (II) states:

Publication of recorded material first distributed before January 1, 1978. Where a musical, dramatic, or literary work was distributed only in the form of phonorecords before January 1, 1978, such musical, dramatic, or literary work was not registerable as a published work under the Act of 1909, as amended. Under the present law, the public distribution of phonorecords on or after January 1, 1978, publishes the musical, dramatic, or literary works recorded thereon. Therefore, if publication of a pre-1978 phonorecord continued on January 1, 1978, that date is considered to be the date of first publication of the underlying work for purposes of copyright registration.

at 900-7.

Section 405.03 of the Compendium of Copyright Office Practices (II) states:

Physical embodiment: phonorecords. On January 1, 1978, phonorecords, including tapes, disks, sound sheets, soundwheels, and piano rolls, became acceptable deposits for registering claims to copyright in music recorded on them. Moreover, music embodied only in phonorecords before 1978

is now acceptable for registration in that form. If such phonorecords were available for sale or public distribution on January 1, 1978, after having been sold or publicly distributed earlier, the musical work would be considered published and the date of such publication is January 1, 1978.

at 400-5.

This section expressly refutes the holding of the District Court in the instant case with respect to its conclusion that the allegedly infringed music was published prior to 1978. Based on this section, the Copyright Office issued Fine a certificate of copyright registration in 1990 for the 1976 musical compositions embodied on his phonorecord and deemed the date of publication as being January 1, 1978.

Section 491 of the Compendium of Copyright Office Practices (II) confirms the distinction Fine makes in the copyright of a sound recording versus a copyright in the underlying musical composition by stating:

Sound recording distinct from underlying work. Copyright in a sound recording relates only to

the particular series of sounds constituting the recording. It is not the same as, nor is it a substitute for, copyright in a musical, dramatic, or literary work, the performance of which is recorded.

at 400-33.

This section corroborates Fine's contention that the District Court's misplaced concern with Fine's lack of a sound recording copyright caused the Court to erroneously conclude that the distribution of Fine's phonorecords amounted to general publication of the allegedly infringed music.

Clearly, the Copyright Office compendium corroborates the Jones rationale with respect to the interplay between the Copyright Acts of 1909 and 1976 concerning the issue of publication. Moreover, the Copyright Office compendium expressly sets forth the reasons why Fine's allegedly infringed music was deemed published on January 1, 1978 and not before as the District Court concluded. That being the case, the Copyright Office compendium illustrates why Fine's music did not, as the District Court

held, pass into the public domain without copyright protection.

Cases cited below by the respondents herein which refer to works held to have passed into the public domain are inapplicable to the instant case in that they are premised on published works prior to 1978 and further do not involve the interplay between the 1909 and 1976 Copyright Acts with respect to the publication of underlying music embodied soley in a phonorecord.

References by the respondents to the Sound Recording Amendment of 1971 are misleading because that amendment did not make phonorecords "copies" for purposes of Copyright Office deposit and did not, in any way, determine that distribution of phonorecords consituted publication of the underlying musical work under the Copyright Act of 1909.

Furthermore, the respondents' attempts to prejudice the courts below by arguing that Fine did not write the "notes" of the allegedly infringed music is misleading since it is undisputed that Fine did author the chords for the music, and moreover, even if Fine had only

authored the lyrics, he would still be deemed to be a joint author of an undivided copyright interest in the entire song. 17 U.S.C. §101; Eckert v. Hurley, 638 F. Supp 699 (1986).

Additionally, any contentions by respondents that the application of California common law would divest Fine of any claimed copyright is false and misleading for the factual record does not indicate that all the sales, distribution and airplay of Fine's song was limited to California, or even that the song was written in California, and that argument is also misplaced since it is based upon the sound recording rather than the relevant issue of the musical composition.

A second reason why this Court should issue Fine's writ goes beyond the District Court's erroneous application of the federal copyright laws, for the Ninth Circuit Court of Appeals compounded the District Court's error by not considering the merits of Fine's appeal and holding that it would not reach an issue raised for the first time on appeal based on the general rule in United States v. Rubalcaba,

811 F.2d 491 (9thCir.1987).

However, Fine's appeal was based on a purely legal issue and raised no new facts, and the appeal simply sought to prevent a miscarriage of justice by having the Ninth Circuit properly apply the federal copyright laws to the undisputed factual record. By not considering the merits of Fine's appeal, the Ninth Circuit overlooked the well-settled exceptions to the general rule as set forth in Bolker v. Commissioner of Internal Revenue, 760 F.2d 1039 (9th Cir.1987), specifically that the Court of Appeals will consider an issue raised for the first time on appeal when the issue presented is purely one of law or when review is necessary to prevent a miscarriage of justice.

These two exceptions are both applicable to the instant case as Fine's appeal raises no new facts distinct from the District Court record, and on appeal to the Ninth Circuit, Fine argued that his musical work was protected by common law copyright from 1976 through 1977 and not by statutory copyright during that period of time as he had argued to the District

Court.

In changing his legal theory on appeal, Fine simply challenged the District Court's Conclusion of Law that his musical work was published by virtue of the 1976-1977 sales and distribution of the phonorecord embodying the musical work and Fine argued that under the 1909 Copyright Act, his musical work was to be considered unpublished and vested with common law copyright until January 1, 1978, the date the Copyright Act of 1976 went into effect and thereby vested the musical work with automatic statutory copyright protection.

The Ninth Circuit seemingly overlooked the supplement to Fine's complaint and the Certificate of Copyright Registration, No. PA 473-592, attached to the supplement to complaint, both of which noted that the date of publication of the musical composition was January 1, 1978 and not any prior date. Even if there was some ambiguity in the pleadings, the Ninth Circuit Court of Appeals could have remanded to the District Court with direction to allow amendment. Scott v. Eversole, 552 F.2d 1110 (9thCir.1973).

However, though Fine's argument on appeal did not prevail, the Ninth Circuit panel was split 2-1 with respect to the suggestion for a rehearing en banc.

The merits of Fine's appeal which was based on pure law and the misapplication of the federal copyright laws should have been considered by the Ninth Circuit Court of Appeals. As this Court stated in Hormel v. Helvering, 312 U.S. 552 (1941), a rigid and undeviating judicially declared practice whereby courts of review would invariably and under all circumstance decline to consider all questions which had not previously been specifically urged would be out of harmony with the policy that rules of procedure and practice should promote, not defeat, the ends of justice.

In Hormel, this Court recognized that while it may be desireable to limit review to the issues raised below, such appellate practice should not be applied when the obvious result would be a plain miscarriage of justice. This Court added that decisions not in accordance with the law should be modified, reversed or

reversed and remanded "as justice may require" and certainly the decisions below in the instant case are not in accordance with the 1909 and 1976 Copyright Acts and result in a miscarriage of justice by stripping Fine of his valid copyright, dismissing his colorable copyright infringement claim without a trial on the merits, and by penalizing him with the possibility of over $220,000 in attorneys' fees and expenses by virtue of being the losing party in a copyright infringement action. 17 U.S.C. §505.

The action taken by this Court in Turner v. City of Memphis, 369 U.S. 350 (1962) was based upon the rationale that an appellate court will consider an issue raised for the first time on appeal when that issue is one of pure law. In that case, the Supreme Court reached the merits of the case although the trial had proceeded no further than a motion for summary judgment which had not yet been passed upon.

In Aguon v. Calvo, 829 F.2d 845 (9thCir. 1987), the Ninth Circuit stated that it was obligated to consider the governing theory of law even though the courts below were not presented

with and did not consider the governing theory of law. The Aguon court stated that failure to properly apply the applicable law was clear error and to resolve the case under an inapplicable legal standard could result in a miscarriage of justice or call into question the integrity of the judicial process. Such is the situation in the instance case where the District Court has misapplied the copyright laws and the Ninth Circuit has affirmed the erroneous conclusions of law by refusing to reach the merits of Fine's appeal.

The new legal theory that Fine raised on appeal was simply that his musical work was protected by common law copyright until 1978 as an unpublished work and thereafter by statutory copyright, whereas in the District Court, Fine had argued that his musical work was protected by statutory copyright since 1976. Fine's change of position on this legal issue is not barred by collateral estoppel as the respondents herein argued to the Ninth Circuit, for the doctrine of collateral estoppel involves separate litigations and not an appeal within the same litigation,

and furthermore, most circuits including the Ninth Circuit do not even apply the doctrine. Milgard Tempering, Inc. v. Selas Corp. of America, 902 F.2d 703 (9thCir.1990); Stevens Technical Services, Inc. v. SS Brooklyn, 885 F.2d 584 (9thCir.1989).

As an owner of a valid copyright and the plaintiff in this meritricious copyright infringement action where the legal elements of "substantial similarity" and "access" have been more than reasonably satisfied, petitioner Fine should not be victimized by the District Court's inability to properly apply the undisputed record facts to the federal copyright laws of 1909 and 1976 and by the appellate court's refusal to consider a new legal theory on appeal.

The framers of the federal copyright laws could not have intended that a claimant in a copyright infringement action based on a pre-1978 musical work be required to be an expert in the complex interplay between the 1909 and 1976 Copyright Acts in order to be protected by the statutes. Fine presented the necessary facts to the District Court and trusted that the Court

would be able to properly apply the facts to the law.

Since Fine had received a valid certificate of copyright registration in 1990 for his 1976 musical work, he knew that his work had not passed into the public domain without copyright protection and that the District Court must have erred when it granted the defendants summary judgment and held that his musical work had passed into the public domain without copyright protection. Consequently, Fine, who the record indicates never previously practiced copyright law either personally or professionally, further researched the District Court's conclusions of law and presented a new legal theory to the Ninth Circuit, and though his new argument regarding what constituted publication under the 1909 and 1976 Copyright Acts was correct, the appellate court refused to consider the new legal issue which was raised for the first time on appeal despite a long list of cases from the Ninth Circuit which demonstrated that the court of appeals did reach a new issue raised for the first time on appeal when the issue presented was purely

one of law or when review was necessary to prevent a miscarriage of justice. Bolker v. Commissioner of Internal Revenue, 760 F.2d 1039 (9thCir.1987); In re Professional Investment Properties of America, 955 F.2d 623 (9thCir.1992); Fry v. Melaragno, 939 F.2d 832 (9thCir.1991); White v. McGinnis, 903 F.2d 699 (9thCir.1990); United States v. Kimball, 896 F.2d 1218 (9thCir.1990); United States v. Castro, 887 F.2d 988 (9thCir.1989); State of Cal. Dept. of Education v. Bennett, 843 F.2d 333 (9thCir. 1988) and 829 F.2d 795 (9thCir.1987); Jordan v. Clark, 847 F.2d 1368 (9thCir.1988); Levin Metals Corp. v. Parr-Richmond Terminal Co., 817 F.2d 1448 (9thCir.1987); United States v. Greger, 716 F.2d 1275 (9thCir.1983); Green v. L.A. Superintendent of Schools, 883 F.2d 1472 (9thCir. 1989); and Prantil v. State of Cal., 843 F.2d 314 (9thCir.1988).

In the instant case, the District Court erred in holding that Fine's allegedly infringed music in the song "Ascending" which was embodied soley in his phonorecord "For God's Sake" had been published prior to January 1, 1978 by virtue of

sales and distribution of the phonorecord in 1976 and 1977 and therefore passed into the public domain without copyright protection. The District Court's holding flies in the face of the Copyright Act of 1909 which stands for the proposition that music embodied soley on a phonorecord is not a "copy" of the phonorecord and therefore protected under common law copyright as an unpublished work prior to January 1, 1978 despite sales of the phonorecord and thereafter protected under statutory copyright automatically by virtue of the changes in the Copyright Act of 1976 with respect to what constitutes publication.

The Ninth Circuit Court of Appeals erred in refusing to reach the merits of Fine's appeal which raised a new issue of pure law in order to prevent the erroneous application of the federal copyright laws to the record facts. The Ninth Circuit's holding flies in the face of well-settled case law and policy demonstrating that a court of appeals will reach an issue raised for the first time on appeal when the issue presented is purely one of law or when review

is necessary to prevent a miscarriage of justice.

Petitioner Fine respectfully requests that this Court issue a writ of certiorari so that these errors are effectively remedied.

## CONCLUSION

The United States Supreme Court is the last refuge for a person unfairly victimized by an interpretation of federal law. It is the final opportunity for truth to prevail, for should this Court deny Fine's petition, the only music emanating from the decision will be the discordant sounds of the death knell of a meritorious claim and the reverberations will be far reaching.

Should this Court decline to breathe life back into Fine's claim, it will have effectively stripped him of a valid copyright in all the songs on his phonorecord, for the District Court's erroneous judgment that Fine's song has passed into the public domain without copyright protection can be used as a sword by other predatory artists who might seek to exploit Fine's music. On a larger scale, all musical compositions embodied soley in phonorecords sold prior to 1978, which should have been protected

by common law copyright under the 1909 Copyright Act, will be deemed to have forfeited their copyright protection.

Furthermore, should this Court decline to revive Fine's claim, it will validate the respondents' continued bad faith efforts to punish Fine with its appeals and applications for attorneys' fees and expenses. The nightmare would continue, for not only has Fine's copyrighted song been stolen, but now Fine finds that he must defend himself against the respondents' concerted actions to obtain over $220,000 in attorneys' fees as the prevailing parties in a copyright infringement action.

Judicial restraint may have its place, but to passively permit Camus' "Stranger" and Kafka's "Trial" to come to life in the 1990's would be a tragic metaphor for American jurisprudence.

When Fine put his music career aside in 1979 in order to attend law school, he did so with the intention of pursuing the same truths that he had sought as a musician. As a law student, Fine was inspired by the seemingly poetic words of truth embodied in the opinions of the Supreme Court.

Now as the petitioner herein, Fine has plowed the fields of copyright law trying to harvest some small grains of truth.

To quote from his subject song "Ascending": "Struggling with right or wrong can be a war within
If you're not sure and must defend.
Truth will claim a victory,
For when the heart commands,
Surrender comes, the soul ascends."

The interests of truth demand that artistic integrity be given breath, and should this Court deny Fine's petition for writ of certiorari, the integrity of the copyright laws will have had its last gasp. The interests of truth demand a forum for fair play, and should this Court deny Fine's petition, truth will have been buried in the grave of appellate procedure.

The interests of truth also demand an absence of fear, and should this Court deny Fine's petition and effectively penalize him with over $220,000 in attorneys' fees being sought under 17 U.S.C. §505, it will have a chilling effect upon any artist who has had his work infringed upon and considers whether or not

to assert his artistic integrity in court.

If the respondents are truly concerned with artistic integrity, they should welcome the opportunity to be vindicated on the merits, yet their papers filed in the lower courts were repleat with misleading contentions as they sought to prejudice the courts against Fine in a desperate attempt to avoid a trier of fact. Unfortunately, up to this point, they have succeeded and now they are one step away from being home free with the stolen goods.

Petitioner Fine is well aware that this Court has before it a full docket of cases that will shape the course of American history and that the Cleveland Indians have a better chance at winning the World Series than Fine has of having this Court decide to hear his case. Having struck out before the District Court and the Ninth Circuit, there are two outs in the bottom of the ninth inning and this petitioner just wants to keep the inning alive so that truth can have one final at bat.

This case should have been properly adjudicated in the courts below, but now that

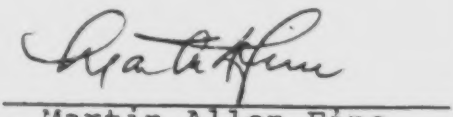
it is before the Supreme Court, petitioner Fine simply requests that this Court not abdicate its responsibility to serve the truth and do what is right. This petition may have chosen the wrong words at times, but what is right is right.

For the reasons set forth above, a writ of certiorari should issue to review the judgments and opinions of the Court of Appeals and District Court in this matter. This Court should grant certiorari here to explicitly rule that a musical composition which is embodied soley on a phonorecord sold prior to 1978 was protected by common law copyright as an unpublished work until January 1, 1978 under the Copyright Act of 1909 and thereafter deemed published and automatically vested with statutory copyright protection under the Copyright Act of 1976. If this Court elects not to address the issues presented in this writ at the present time, it is requested that the writ issue and that the matter be remanded to the Court of Appeals for redetermination in light of this Court's opinion in Hormel v. Helvering, supra, the Compendium of

Copyright Office Practices, and the other relevant cases cited hereinabove.

DATED: December 24, 1992

Respectfully submitted,



Martin Allen Fine

Petitioner in Propia Persona

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

| | | |
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| MARTIN ALLEN FINE, | ) | No. 91-55657 |
| | ) | |
| Plaintiff-Appellant, | ) | D.C. No. CV-90-1001-RMT |
| | ) | |
| v. | ) | |
| | ) | |
| TOM PETTY; JEFF LYNNE; MIKE CAMPBELL; MCA RECORDS, INC., et al., | ) | MEMORANDUM* |
| | ) | |
| Defendants-Appellees. | ) | |

Appeal from the United States District Court for the Central District of California
Robert M. Takasugi, District Court Judge, Presiding

Argued and Submitted August 20, 1992
Pasadena, California

Before: TANG and HALL, Circuit Judges, and SHUBB, District Judge**

Martin Allen Fine appeals the district court's grant of summary judgment to defendants in this copyright infringement action. We affirm.

Fine argues on appeal that the district court erred when it found that his composition was published before January 1, 1978, and had therefore entered the public domain. This is a theory different than that which Fine relied upon

below. Indeed, in Fine's complaint he alleged that he published the composition before January 1, 1978.

We will generally not reach an issue raised for the first time on appeal. United States v. Rubalcaba, 811 F.2d 491, 493 (9thCir.), cert. denied, 484 U.S. 832 (1987). We have discretion to reach the issue if the record is sufficiently developed and the opposing party will suffer no prejudice. Id. We decline to reach this issue because Fine has presented no legitimate reason why he did not present this theory to the district court. We will not permit litigants to change their positions on appeal. Defendants may well have developed the record below differently had Fine argued this theory before the district court. Accordingly, the judgment below is AFFIRMED.

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* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. R. 36-3.

**Honorable William B. Shubb, United States District Judge for the Eastern District of

California, sitting by designation.

N O T F O R P U B L I C A T I O N

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

| | | |
|---|---|---|
| MARTIN ALLEN FINE, | ) | No. 91-55657 |
| | ) | |
| Plaintiff-Appellant, | ) | D.C. No. CV-90-1001-RMT |
| | ) | |
| v. | ) | |
| | ) | |
| TOM PETTY; JEFF LYNNE; MIKE CAMPBELL; MCA RECORDS, INC., et al., | ) | ORDER |
| | ) | |
| Defendants-Appellees. | ) | |
| | ) | |

Before: TANG and HALL, Circuit Judges, and SHUBB, District Judge*

The panel has voted to deny appellant's petition for rehearing. Judges Tang and Hall have voted to reject the sugguestion for rehearing en banc and Judge Shubb so recommends.

The full court has been advised of the suggestion for rehearing en banc and no active judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

The petition for rehearing is DENIED and the suggestion for rehearing en banc is REJECTED.

* Honorable William B. Shubb, United States District Judge for the Eastern District of

California, sitting by designation.

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

| | | |
|---|---|---|
| MARTIN ALLEN FINE,<br><br>Plaintiff,<br><br>vs.<br><br>TOM PETTY, JEFF LYNNE, MIKE CAMPBELL, MCA RECORDS INC., SBK APRIL MUSIC INC., WARNER BROTHERS MUSIC CORPORATION and GONE GATOR MUSIC,<br><br>Defendants. | ) | No. CV 90-1001-RMT (Tx)<br><br>JUDGMENT |

This matter having come before the court on the motion by defendants Tom Petty, Jeff Lynne, Mike Campbell and WB Music Corp. for summary judgment, in which defendants SBK April Music Inc. and MCA Records, Inc. have filed joinders, and this court having considered the pleadings and other documents filed herein and having filed findings of fact and conclusions of law concurrently herewith,

IT IS ORDERED, ADJUDGED AND DECREED that the motion for summary judgment is granted and plaintiff Martin Allen Fine shall have and recover nothing as against defendants Tom Petty; Jeff Lynne; Mike Campbell; MCA Records, Inc.;

SBK April Music Inc. and WB Music Corp.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that this action is dismissed as against Gone Gator Music for lack of prosecution.

Dated: 4/25/91

Robert M. Takasugi
United States District Judge

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

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| MARTIN ALLEN FINE,<br><br>Plaintiff,<br><br>vs.<br><br>TOM PETTY, JEFF LYNNE, MIKE CAMPBELL, MCA RECORDS INC., SBK APRIL MUSIC INC., WARNER BROTHERS MUSIC CORPORATION and GONE GATOR MUSIC,<br><br>Defendands. | No. CV-90-1001-RMT (Tx)<br><br>FINDINGS OF FACT AND CONCLUSIONS OF LAW |

This matter having come before the court on the motion by defendants Tom Petty, Jeff Lynne, Mike Campbell and WB Music Corp. for summary judgment, in which defendants SBK April Music Inc. and MCA Records, Inc. have filed joinders, and this court having considered the pleadings and other documents filed herein, the court now makes the following findings of fact and conclusions of law:

FINDINGS OF FACT

1. In connection with his claim to copyright for "In Life with Love," including "Ascending," plaintiff Fine deposited with the Copyright Office on or before June 7, 1976, a

one-page typed sheet listing words for the three verses and chorus of "Ascending" as well as interlineated handwritten letters intended to indicate musical chords.

2. On or before August 16, 1976, plaintiff Fine sent to the United States Copyright Office a claim to copyright in a compilation entitled "In Life with Love," which compilation includes the words and "music" to "Ascending."

3. Plaintiff Fine's deposit with the Copyright Office of "Ascending" does not indicate a concluding instrumental section nor the chord progression therein nor the guitar solo therein.

4. In or around September, 1976, plaintiff Fine and others recorded a phonorecord album entitled "For God's Sake," which includes a recorded version of "Ascending." This recorded version contains a concluding instrumental section.

5. Between October, 1976, and 1978, copies of the album "For God's Sake" have been offered for sale and sold to the general public, distributed to record stores for sale to the general public and sent to radio stations to

obtain air play.

6. Of the 1,000 copies of the album "For God's Sake" originally manufactured, plaintiff sold or distributed several hundred to the general public before January 1, 1978.

7. Plaintiff Fine brings this action for copyright infringement claiming that defendants copied the concluding instrumental section of the recorded version of "Ascending," which was included in plaintiff's album entitled "For God's Sake."

Any finding of fact which may be deemed a conclusion of law is hereby incorporated into the Conclusions of Law below, and any conclusion of law which may be deemed a finding of fact is hereby incorporated into the Findings of Fact above.

## CONCLUSIONS OF LAW

1. This court has subject matter jurisdiction. 28 U.S.C. §1338.

2. Plaintiff Fine's claim of copyright in "Ascending" is delimited by his June, 1976, deposit with the Copyright Office in connection with the registration of his claim assigned

number EP 357416.

3. Plaintiff Fine's claim of copyright in "Ascending" extends only to the words and chord indications on the June, 1976, deposit of the page entitled "Ascending."

4. Plaintiff Fine did not register a claim of copyright to the instrumental music concluding the recorded version of "Ascending" on or before February 28, 1990.

5. Plaintiff Fine's claim of copyright, Certificate No. EP 357416, does not protect the instrumental music concluding the recorded version of "Ascending."

6. Plaintiff Fine's sale and distribution and attempts to sell and distribute copies of the phonorecord album "For God's Sake" in 1976 and 1977 amounted to general publication of the instrumental segment concluding the recorded version of "Ascending."

7. Plaintiff Fine has not obtained a sound recording copyright for the album "For God's Sake" or the recorded version of "Ascending."

8. The instrumental segment concluding the recorded version of "Ascending" passed into

the public domain before January 1, 1978, thereby precluding any copyright protection pursuant to Section 103 of the Copyright Act of 1976.

9. Defendants are entitled to summary judgment.

Dated: 4/25/91

Robert M. Takasugi
United States District Judge

## STATUTORY PROVISIONS INVOLVED

37 C.F.R. §202.8(b) (1971):

A phonograph record or other sound recording is not considered a "copy" of the compositions recorded on it, and is not acceptable for copyright registration.

17 U.S.C. §2 (1909):

RIGHTS OF AUTHOR OR PROPRIETOR OF UNPUBLISHED WORK.---Nothing in this title shall be construed to annul or limit the right of the author or proprietor of an unpublished work, at common law or in equity, to prevent the copying, publication, or use of such unpublished work without his consent, and to obtain damages therefor.

17 U.S.C. §101 (1976):

Definitions. As used in this title, the following terms and their variant forms mean the following:

"Copies" are material objects, other than phonorecords, in which a work is fixed by any method now known or later developed, and from which the work can be perceived, reproduced, or otherwise communicated, either directly or

with the aid of a machine or device. The term "copies" includeds the material object, other than a phonorecord, in which the work is first fixed.

A work is "created" when it is fixed in a copy or phonorecord for the first time; where a work is prepared over a period of time, the portion of it that has been fixed at any particular time constitutes the work as of that time, and where the work has been prepared in different versions, each version constitutes a separate work.

A work is "fixed" in a tangible medium of expression when its embodiment in a copy or phonorecord, by or under the authority of the author, is sufficiently permanent or stable to permit it to be perceived, reproduced, or otherwise communicated for a period of more than transitory duration. A work consisting of sounds, images, or goth, that are being transmitted, is "fixed" for purposes of this title if a fixation of the work is being made simultaneously with its transmission.

A "joint work" is a work prepared by two or

more authors with the intention that their contributions be merged into inseparable or interdependent parts of a unitary whole.

"Publication" is the distribution of copies or phonorecords of a work to the public by sale or other transfer of ownership, or by rental, lease, or lending. The offering to distribute copies or phonorecords to a group of persons for purposes of further distribution, public performance, or public display, constitutes publication. A public performance or display of a work does not of itself constitute publication.

17 U.S.C. §401(a) (1976):

Notice of copyright: Visually perceptible copies. (a)GENERAL REQUIREMENT.---Whenever a work protected under this title is published in the United States or elsewhere by authority of the copyright owner, a notice of copyright as provided by this section shall be placed on all publicly distributed copies from which the work can be visually perceived, either directly or with the aid of a machine or device.

17 U.S.C. §408(a) (1976):

REGISTRATION PERMISSIVE.---At any time during the subsistence of copyright in any published or unpublished work, the owner of copyright or of any exclusive right in the work may obtain registration of the copyright claim by delivering to the Copyright Office the deposit specified by this section, together with the application and fee specified by sections 409 and 708. Subject to the provisions of section 405(a), such registration is not a condition of copyright protection.